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**TO: Clients of Sitzmann Morris & Lavis Insurance Agency**

**RE: Comparative Effectiveness Research Fee Final Rules**

On December 6<sup>th</sup> the Internal Revenue Service (IRS) issued a final rule addressing the comparative effectiveness research (CER) fees which will help fund the Patient-Centered Outcomes Research Institute (PCORI).

Background: Please review our July issue of *Insurance Brief* for details on the April 2012 CER proposed regulations. In brief, under the Affordable Care Act (ACA) the CER fee will be imposed on both health insurers (in the case of fully-insured) and plan sponsors of self-insured health plans. If you have all fully-insured health plans then your insurer will be paying the fee. If you have a self-insured health plan then you are responsible for paying the fee.

For plans ending on or after October 1, 2012 (the first year), the fee is \$1.00 multiplied by the number of lives (including spouses and dependents) covered under the plan during that year. For the second year, the fee will be \$2.00 multiplied by the number of lives covered in the second year.

Key Provisions:

In response to comments on the April 2012 proposed regulations, the IRS made the following modifications:

**Insurance Policies Subject to CER fees:** The proposed regulations had an inconsistent definition between self-insured health plans and insurance policies. The final rule changes the definition of a “specified health insurance policy” such that it also does not include a policy that

provides for an employee assistance program, disease management program or wellness program if the program does not provide significant benefits in the nature of medical care or treatment.

**Retiree Coverage:** The fee applies to health insurance policies and self-insured health plans that provide accident and health coverage to retirees, including retiree-only policies and plans;

**COBRA continuation coverage:** COBRA and similar continuation coverage (Cal-COBRA, for example) must be taken into account when determining the CER fee.

**Lives Taken Into Account in Calculating the Fee:** The fee imposed on an issuer of a fully-insured policy is based on the average number of lives covered under the policy during the policy year. The fee imposed on a plan sponsor of a self-insured plan is based on the average number of lives covered during the plan year. Commentators had requested that the fee not apply multiple times if coverage is provided to one individual through more than one policy or self-insured arrangement (for example, a fully-insured medical policy and a self-insured Rx policy). The IRS argued that this reflects congressional intent for the fee to extend to both insured and self-insured arrangements and therefore no change was made to the regulations. The plan sponsor with a fully-insured medical policy and an HRA will still need to remit a fee on the HRA.

### **Health Reimbursement Arrangements (HRAs) and Health Flexible Spending**

**Arrangements (FSAs):** Commentators requested that all HRAs be excluded from the definition of applicable self-insured health plans, or alternatively that HRAs that are integrated with coverage be excluded. The IRS maintained that these regulations do not permit a plan sponsor to treat the HRA and a fully-insured plan as a single plan. The final rules include additional examples to clarify the application of the CER fee to an HRA, including an HRA with another plan. The IRS also rejected the request that fees not apply to a FSA that is not an excepted benefit if the employee is covered by a major medical plan. (FSA plans that only include employee contributions are still an excepted benefit and no CER fees apply.)

**Determination of U.S. Residency:** The final regulations adopt the rule that if the address on file with the issuer or plan sponsor for the primary insured is outside of the United States, the

issuer or plan sponsor may treat the primary insured and their dependents as having the same place of abode. The final regulations clarify that for purposes of the CER fee “an individual residing in the United States” means an individual who has a place of abode in the United States. Therefore, an individual on a temporary U. S. visa who has a place of abode in the United States is residing in the United States.

**Self-insured Expatriate Plans:** Under both the proposed and final regulations, a specified health insurance policy does not include any group policy designed and issued to cover primarily employees who are working and living outside the US (that is, expatriate plans). The final regulations clarify that an applicable self-insured health plan likewise does not include a self-insured plan that is an expatriate plan.

**Correction and Amendments of Form 720:** As discussed in the proposed regulations, the CER fee must be reported and paid on the Form 720, “Quarterly Federal Excise Tax Return.” The final rules do not adopt any provisions for plan sponsors to correct, without penalty, inadvertent errors. The rules to provide that penalties related to late filing or payment may be waived or abated if the issuer or plan sponsor has reasonable cause and the failure was not due to willful neglect. Form 720X, “Amended Quarterly Federal Excise Tax Return,” may be used to make adjustments.

#### What’s Next:

In a footnote, the IRS noted that the Department of Labor plans to provide additional guidance in the near future addressing CER fee payments under ERISA. We will provide you with more detail as it becomes available. As always, contact your SML Account team if you have any questions.

The information provided in this legislative update for our clients and colleagues is for general guidance only and is not intended to be, and does not constitute, tax or legal advice. We recommend that you consult with your tax and legal advisors for the interpretation or application of any laws for your particular circumstances and situation.